UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOAQUIN R. WINFIELD,

Plaintiff,

v. 9:09-CV-1055 (LEK/GHL)

WALTER BISHOP, DAVID LECLAIR, NANCY MAROCCO,

Defendants.

APPEARANCES: OF COUNSEL:

JOAQUIN R. WINFIELD, 97-A-5399
Plaintiff *pro se*
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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Counsel for Defendants
The Capitol
Albany, NY 12224

RICHARD LOMBARDO, ESQ.

GEORGE H. LOWE, United States Magistrate Judge

ORDER and REPORT-RECOMMENDATION

This *pro se* prisoner civil rights action, commenced pursuant to 42 U.S.C. § 1983, has been referred to me for Report and Recommendation by the Honorable Lawrence E. Kahn, Senior United States District Judge, pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). Plaintiff Joaquin R. Winfield alleges that Defendant Walter Bishop[1] subjected him to excessive

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[1] This defendant was identified in the original complaint as "John Doe Bishop." Pursuant to a request from Defendants, I directed the Clerk to list his correct name on the docket. (Dkt. No. 18.) I will refer to him throughout this action as Walter Bishop.

force, that Defendant Nancy Marocco[2] conducted a flawed disciplinary hearing, and that Defendant David LeClair wrongfully imposed a restricted diet on him and failed to respond properly to his grievances. The matter is currently before the Court for screening of Plaintiff's amended complaint (Dkt. No. 38).

I. FACTUAL AND PROCEDURAL SUMMARY

A. The Original Complaint

Plaintiff's original complaint alleged that he was issued a misbehavior report on November 26, 2006, for refusing to return his lunch tray. (Dkt. No. 1 at 8, 10.) Pending a hearing on the misbehavior report, Defendant David LeClair authorized staff to place Plaintiff on a restricted diet from November 27, 2006, to December 3, 2006. *Id.* at 10. The hearing on the misbehavior report was held on December 7, 2006. *Id.* at 9. The hearing officer imposed a penalty of seven days of restricted diet. *Id*. at 11. Defendant LeClair issued a memorandum to the facility's health services director stating that Plaintiff would be on a restricted diet from December 14 through December 20 as a result of the December 7 hearing. *Id*. at 11-12. Although it is not entirely clear from the complaint, it appears that Plaintiff continuously received the restricted diet from November 27 through December 20. Plaintiff's original complaint alleged, essentially, that Plaintiff was punished more than once for the conduct alleged in the misbehavior report because he received the restricted diet for longer than seven days.[3]

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[2] This defendant is identified in both the original and amended complaints as "Nancy Machell." Pursuant to a request from Defendants, I directed the Clerk to list her correct name on the docket. (Dkt. No. 18.) I will refer to her throughout this action as Nancy Marocco.

[3] Specifically, Plaintiff alleged that "though only verbally enlightened and *never* checked incident to by any medical staff therein pursuant to Dept. protocols, the resulting

Plaintiff's original complaint alleged that Defendant Bishop subjected him to excessive force on December 5, 2006. (Dkt. No. 1 at 4-5.) Plaintiff alleges that he sent a written complaint about this incident to Defendant LeClair. *Id*. at 6.

On December 14, 2006, Plaintiff was served with another misbehavior report. (Dkt. No. 1 at 14-15.) In preparation for his disciplinary hearing, Plaintiff requested a videotape of the incident. *Id*. at 15. Although it was not entirely clear, the original complaint appeared to allege that the videotape was lost or erased and thus was not provided to Plaintiff. *Id*. at 7. Defendant Nancy Marocco conducted the disciplinary hearing. *Id*. She adjourned and continued the hearing at least twice. *Id*. at 17-18. Ultimately, she denied Plaintiff's request to call an inmate witness, found a photograph of Plaintiff's wrist inadmissible, found Plaintiff guilty, and sentenced him to nine months of SHU confinement with loss of privileges and good time credits. *Id*. at 15, 21.

Plaintiff's original complaint alleged that he informed Defendant LeClair of his "inferred fear . . . of further punitive informalities resulting from both the 8th U.S. Constitutional Amendment tort per se and also the past shown and highly prone history of losing/or erasing the B-1 c. (S.H.U.) video recordings of probative value." (Dkt. No. 1 at 7.)

Plaintiff's original complaint alleged that Defendants' conduct violated his constitutional

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misbehavior report *at least* provided an initial basis of/or for and/or by both § § 304.2 (c) of Title 7 N.Y.C.R.R.'s N.Y. State Dept. of Correctional Svcs. Directive 4933 of Ch. VI and § 138.5 of N.Y. States Correction Law. Any properly corresponding punitive sanction would have been and was imposed and completed in a/the pre-hearing context commencing the morning meal of breakfast on November 27, 2006, and ending the evening/or dinner meal of December 3, 2006. Both the second encaptioned defendant Superintendent David LeClair's cognizance, as well as, twice (2x) the above allegations are demonstrated by the on record actions of Defendant D. LeClair's designated delegate Lt. K. Smith four days later on the date of December 7, 2006." (Dkt. No. 1 at 8-9, emphases in original.)

rights. (Dkt. No. 1.) Plaintiff alleged that Defendant LeClair, as the Superintendent of Great Meadow Correctional Facility, should be held responsible because he "managed . . . daily operation[s] and executed both the N.Y. State Department of Corrections and the prison policies." (Dkt. No. 1 at 4.)

B. Dismissal of Original Complaint With Leave to Amend

Defendant LeClair moved to dismiss the original complaint as it pertained to him.[4] (Dkt. No. 14.) Plaintiff opposed the motion. (Dkt. No. 19.) On June 21, 2010, I recommended that the complaint be dismissed as to Defendant LeClair with leave to amend two claims. (Dkt. No. 22.) Specifically, I found that (1) to the extent that Plaintiff claimed that Defendant LeClair was liable for the acts of the other Defendants due solely to his position as the Superintendent of Great Meadow Correctional Facility, any such claim should be dismissed without leave to amend due to Defendant LeClair's lack of personal involvement; (2) the due process claim against Defendant LeClair regarding the imposition of the restricted diet should be dismissed without leave to amend because the diet did not constitute an atypical and significant hardship; (3) the Eighth Amendment claim against Defendant LeClair regarding the imposition of the restricted diet should be dismissed with leave to amend to add allegations that the diet "was nutritionally inadequate, posed an imminent health risk, or physically injured" Plaintiff; (4) to the extent that Plaintiff claimed that Defendant LeClair failed to respond to Plaintiff's grievance about Defendant Bishop's alleged use of excessive force, the claim should be dismissed without leave

[4] Defendants Bishop and Marocco answered the original complaint. (Dkt. No. 15.)

to amend due to Defendant LeClair's lack of personal involvement;[5] and (5) the claim that Defendant LeClair failed to respond to a grievance about Plaintiff's "inferred fear . . . of further punitive informalities resulting from both the 8th U.S. Constitutional Amendment tort per se and also the past shown and highly prone history of losing/or erasing the B-1c. (S.H.U.) video recordings of probative value" should be dismissed with leave to amend to allege that Defendant LeClair was aware of this "highly prone history" before Plaintiff's disciplinary hearing. (Dkt. No. 22.)

On July 12, 2010, the Court approved and adopted the Report-Recommendation in its entirety. (Dkt. No. 28.)

C. Amendment of the Complaint

On September 2, 2010, the Court received a letter from Plaintiff requesting advice about how to structure his amended complaint. (Dkt. No. 29.) In response, the Court issued a text order advising Plaintiff that "his amended complaint should only include those claims for which the July Order granted him leave to amend" and that any amended complaint should be filed on or before September 30, 2010. (Text Order, Sept. 2, 2010.) On September 3, 2010, the Court issued a text order clarifying that the amended complaint should include "(1) those claims against Defendant LeClair for which the July 12, 2010, Order granted him leave to amend and (2) an exact duplication of his claims against defendants Bishop and Marocco." (Text Order, Sept. 3, 2010.) The order advised Plaintiff that if he failed to file an amended complaint by September 30, 2010, his claims against Defendant LeClair would be dismissed without further order of the

[5] In his amended complaint, Plaintiff states that he "*never* alleged a claim based upon an ignored/or never responded to Walter Bishop grievance . . . " (Dkt. No. 38 at 10) (emphasis in original).

Court. *Id*.

On September 16, 2010, I granted Plaintiff's request for an extension of time to October 29, 2010, to file his amended complaint. (Text Order, Sept. 16, 2010.)

On October 8, 2010, the case was stayed and referred to the Pro Se Prisoner Settlement Program. (Dkt. No. 33.)

On October 18, 2010, Plaintiff advised the Court that he would not be able to file an amended complaint by October 29, 2010. (Dkt. No. 35.) Plaintiff filed his amended complaint on December 29, 2010.[6] (Dkt. No. 38.)

On March 18, 2011, the stay was lifted and the case was returned to the active docket. (Text Order, Mar. 18, 2011.)

II. ANALYSIS

A. Eighth Amendment Claim

The original complaint alleged that Defendant LeClair violated Plaintiff's Eighth Amendment rights by imposing a restricted diet on him. (Dkt. No. 1 at 11-12.) This claim was dismissed because, under Second Circuit precedent, "allegations regarding the imposition of a restricted diet do not state an Eighth Amendment claim absent an allegation that the diet was nutritionally inadequate, posed an imminent health risk, or physically injured the prisoner." (Dkt. No. 22 at 8; Dkt. No. 28 at 3.) The original complaint did not allege that the diet was nutritionally inadequate, posed an imminent health risk, or physically injured Plaintiff. Plaintiff was granted to leave to amend to add such allegations. *Id*.

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[6] Defendants asserted at one point that Plaintiff's amended complaint should be rejected as untimely. (Dkt. No. 39.) Defendants withdrew that assertion in a later letter to the Court. (Dkt. No. 41 at 2.)

In the amended complaint, Plaintiff alleges at length that he was wrongfully subjected to several weeks of the restricted diet rather than the seven days to which he was sentenced. (Dkt. No. 38 at 11-16.) Plaintiff states that he "need not meet [the] vigorous standard to satiate 8th Amendment criteria. Plaintiff need only show the reinfliction unnecessary/ or unwarranted." (Dkt. No. 38 at 29 n.34.) As discussed below, Plaintiff apparently intends to assert his restricted diet claim as a due process issue rather than as an Eighth Amendment issue. *Id*. at 28-29. Given Plaintiff's *pro se* status, I must construe the amended complaint liberally, reading it to raise the strongest arguments it suggests. *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007). I have, therefore, carefully reviewed the amended complaint to determine whether it states an Eighth Amendment claim, despite Plaintiff's assertion that he "need not meet" that standard.

Plaintiff alleges that on one occasion he expressed "qualms with regard to the browning perimeter of the machine shredded vegetation and the egregious condition of the bread-based parched meal." (Dkt. No. 38 at 15.) Plaintiff does not allege that any other meals he received were "browning" or "parched," that the restricted diet was nutritionally inadequate, that the diet posed an imminent health risk, or that it physically injured him. Even if one assumes that the meal to which Plaintiff objected was entirely inedible, such an allegation is insufficient to state an Eighth Amendment claim. *Gill v. Hoadley*, 261 F. Supp. 2d 113, 129 (N.D.N.Y. 2003) (finding that complaint failed to state Eighth Amendment claim where prisoner alleged he was denied one meal). Therefore, I find that the amended complaint does not comply with the Court's July 12, 2010, order and I recommend that the Court dismiss Plaintiff's Eighth Amendment claim without leave to amend.

B. Claim Regarding Loss of Video Recordings

The original complaint alleged that Defendant LeClair violated Plaintiff's rights by failing to respond to a grievance that informed Defendant LeClair of Plaintiff's "inferred fear . . . of further punitive informalities resulting from both the 8th U.S. Constitutional Amendment tort per se and also the past shown and highly prone history of losing/or erasing the B-1 c. (S.H.U.) video recordings of probative value." (Dkt. No. 1 at 7.) In that grievance, Plaintiff, apparently, objected to the fact that he was not able to receive a copy of the security video showing his encounter with Defendant Bishop and expressed his fear that he would face similar problems in the future. (Dkt. No. 1 at 15.) The original complaint did not allege that Defendant LeClair was aware of the "highly prone history" of losing or erasing videotapes before Plaintiff's disciplinary hearing. (Dkt. No. 1.) This claim was dismissed because when a prison official "is confronted with a violation that has already occurred and is not ongoing, then the official will not be found personally responsible for failing to remedy a violation." (Dkt. No. 22 at 9) (quoting *Harnett v. Barr*, 538 F. Supp. 2d 511, 524 (N.D.N.Y. 2008)). Plaintiff was granted leave to amend to add allegations that Defendant Le Clair was aware of an ongoing violation. *Id*. The amended complaint does not include any facts plausibly suggesting that Defendant LeClair was personally involved in any alleged constitutional violation regarding the loss of the videotape. Therefore, I recommend that the Court dismiss this claim without leave to amend.

C. New Claims

In the amended complaint, Plaintiff appears to assert, for the first time, an equal protection claim and a retaliation claim. (Dkt. No. 38 at 17-24.) Specifically, Plaintiff alleges that:

> And though in possible discord with any failed connotations of the perhaps quasi-flagrant circumstantial applicability herein in any preceding REPORT RECOMMENDATION[S] and/or DECISION[S] & ORDER[S], surely some if not any prudent jurist of contemporary times concurs with the *City of Cleburne Living Center*, holding that "The Equal Protection Clause requires that the government treat all similarly situated people alike[.]" And though perhaps a member via ancestry, the failed provision by defendant of a supporting racially-based inference, en-junct with the fact of defendant LeClair's cognizance of my preceding history of written facility operation oriented complaint to Authorities in Albany as well as the fact that neither he nor any case-entailed defendant LeClair's counsel can cite so likewise irrationally violated part 304 of Directive No. 4933 of 7. N.Y.C.R.R's Ch. VI as in the sole instance herein, I will pursue what this Court in *Cohn v. New Paltz* declared "The less vigorous 'rational relationship' standard which requires that plaintiffs treatment was **rationally** related to a **legitimate** governmental interest."

(Dkt. No. 38 at 17-18) (citations omitted) (emphasis in original).

I will review these new claims separately pursuant to 28 U.S.C. § 1915(e)(2). Section 1915(e)(2) directs that, when a plaintiff seeks to proceed *in forma pauperis*, " . . . the court shall dismiss the case *at any time* if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B) (emphasis added).[7] Although the court has the duty to show liberality towards *pro se* litigants, *Nance v. Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam), and extreme caution should be exercised in ordering *sua sponte* dismissal of a pro se complaint before the adverse party has been served and the parties have had an opportunity to respond, *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983), there is a responsibility on the court to determine that a claim is not frivolous before

[7] In determining whether an action is frivolous, the court must look to see whether the complaint lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

permitting a plaintiff to proceed with an action *in forma pauperis*. *See e.g. Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir. 1991) (per curiam) (holding that a district court has the power to dismiss a complaint *sua sponte* if the complaint is frivolous).

1. Equal Protection Claim

The Equal Protection Clause provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause "bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if 'such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" *Bizzarro v. Miranda*, 394 F.3d 82, 86 (2d Cir. 2005) (quoting *LeClair v. Saunders*, 627 F.2d 606, 609-10 (2d Cir. 1980)). Governmental action may also violate the Equal Protection Clause where the defendants intentionally treat the plaintiff "differently from others with no rational basis for the difference in treatment." *Id*. (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). Thus, a plaintiff asserting an equal protection claim must allege facts plausibly suggesting that (1) he was treated differently from similarly situated individuals; and (2) the defendants treated him differently due to his membership in a protected class, inhibited his exercise of a fundamental right, acted out of malice, or acted irrationally and arbitrarily.

Here, Plaintiff does not assert that he is a member of a protected class.[8] Nor has he alleged facts plausibly suggesting that Defendants inhibited or punished his exercise of a fundamental right.[9] Plaintiff's equal protection claim is thus properly classified as a "class-of-one" claim, alleging that Defendants acted either out of malice or irrationally and arbitrarily.

It is extremely difficult for class-of-one plaintiffs to allege facts plausibly suggesting that they were treated differently from similarly situated individuals. "[C]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006.)

Here, Plaintiff has not alleged the existence of any similarly-situated individuals, much less any individuals with a "high degree of similarity" to Plaintiff. The closest Plaintiff comes is to allege that Defendant LeClair:

> singled Plaintiff out with unparalleled specificity and the Court should fail to see how the misbehavior report allegations of correspondence can justify the illegally reinflicted dietary sanctions

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[8] The closest Plaintiff comes to such an allegation is to say that "though perhaps a member via ancestry, the failed provision by defendant of a supporting racially-based inference." (Dkt. No. 38 at 17.) This sentence fragment does not plausibly allege that Plaintiff is a member of a protected class.

[9] The fundamental rights protected by the Equal Protection Clause, as identified by the United States Supreme Court, fall into six substantive categories: (1) the right to freedom of association; (2) the right to vote; (3) the right to interstate travel; (4) the right to fairness in the criminal process (which includes the right to counsel and the right of access to the courts); (5) the right to procedural due process; and (6) the right to privacy "which includes various forms of freedom of choice in matters relating to the individual's personal life" such as freedom of choice in marital decisions, child bearing, and child rearing. 2 Ronald D. Rotunda & John E. Nowak, Treatise On Constitutional Law Substance and Procedure, § 15.7 (4th ed. 2010). Although Plaintiff alleges that Defendant LeClair violated his right to procedural due process by reimposing the restricted diet, as discussed in my previous Report-Recommendation, Plaintiff fails to state a procedural due process claim regarding the restricted diet because he has not alleged facts plausibly suggesting that he was deprived of a property or liberty interest.

> in the sole case herein. In particular the Court should see *absolutely* **no justifying differences** between the founding misbehavior report allegations and/or circumstances of plaintiff and any other prisoner.

(Dkt. No. 38 at 24-25, emphasis in original.) This does not plausibly allege that there were other prisoners with a high degree of similarity to Plaintiff who were treated differently. Therefore, I recommend that the Court dismiss Plaintiff's equal protection claim.

Where a *pro se* complaint fails to state a cause of action, the court *generally* "should not dismiss without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (internal quotation and citation omitted). Of course, an opportunity to amend is not required where the plaintiff has already amended the complaint. *See Advanced Marine Tech. v. Burnham Sec ., Inc.*, 16 F. Supp. 2d 375, 384 (S.D.N.Y.1998) (denying leave to amend where plaintiff had already amended complaint once). Here, even a liberal reading of the proposed amended complaint does not indicate that Plaintiff might state a valid equal protection claim. Moreover, Plaintiff has already amended his complaint once. Therefore, I recommend that the Court dismiss the equal protection claim without leave to amend.

2. Retaliation Claim

Plaintiff alleges that Defendant LeClair had "cognizance of [Plaintiff's] preceding history of written facility operation oriented complaint to Authorities in Albany." (Dkt. No. 38 at 17.) Construed broadly, Plaintiff may be alleging that Defendant LeClair retaliated against him.

Claims of retaliation find their roots in the First Amendment. *See Gill v. Pidlypchak*, 389 F.3d 379, 380-81 (2d Cir. 2004). Central to such claims is the notion that in a prison setting, corrections officials may not take actions that would have a chilling effect upon an inmate's

exercise of First Amendment rights. *See Gill*, 389 F.3d at 381-383. Because of the relative ease with which claims of retaliation can be incanted, however, courts have scrutinized such retaliation claims with particular care. *See Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983). As the Second Circuit has noted,

> [t]his is true for several reasons. First, claims of retaliation are difficult to dispose of on the pleadings because they involve questions of intent and are therefore easily fabricated. Second, prisoners' claims of retaliation pose a substantial risk of unwarranted judicial intrusion into matters of general prison administration. This is so because virtually any adverse action taken against a prisoner by a prison official--even those otherwise not rising to the level of a constitutional violation--can be characterized as a constitutionally proscribed retaliatory act.

Dawes v. Walker, 239 F.3d 489, 491 (2d Cir. 2001) (citations omitted), *overruled on other grounds*, *Swierkewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

To prevail on a retaliation claim under 42 U.S.C. § 1983, a plaintiff must prove by the preponderance of the evidence that: (1) the speech or conduct at issue was "protected"; (2) the defendants took "adverse action" against the plaintiff–namely, action that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights; and (3) there was a causal connection between the protected speech and the adverse action--in other words, that the protected conduct was a "substantial or motivating factor" in the defendants' decision to take action against the plaintiff. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Gill*, 389 F.3d at 380 (citing *Dawes v. Walker*, 239 F.3d 489, 492 [2d. Cir. 2001]).

Here, Plaintiff has alleged sufficient facts for his retaliation claim to survive initial

review.[10] Plaintiff has alleged facts plausibly suggesting that he was engaged in protected conduct. The filing of a grievance against prison officials is constitutionally protected conduct. *Scott v. Coughlin*, 344 F.3d 282, 288 (2d Cir. 2003); *Graham v. Henderson,* 89 F.3d 75, 80 (2d Cir. 1996).

Plaintiff has also alleged facts plausibly suggesting that Defendant LeClair took adverse action against him. The Second Circuit defines "'adverse action' *objectively,* as retaliatory conduct 'that would deter a similarly situated individual of ordinary firmness from exercising ... constitutional rights.'" *Gill v. Pidlypchak*, 389 F.3d 379, 381 (2d Cir. 2004)(quoting *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003), *superceded by* 320 F.3d 346, 2003 WL 360053 (2d Cir. Feb. 10, 2003)) (emphasis in original). The Second Circuit has "made clear that this objective test applies even where a particular plaintiff was not himself subjectively deterred; that is, where he continued to file grievances and lawsuits." *Gill*, 389 F.3d at 381. For the purposes of initial review, it is plausible that the imposition of a restricted diet for a longer period than that to which he was sentenced could deter a similarly situated individual from exercising constitutional rights.

Finally, Plaintiff has alleged facts plausibly suggesting, for the purpose of initial review, a causal connection between the alleged protected activity and the alleged adverse action. "A plaintiff can establish a causal connection that suggests retaliation by showing that protected activity was close in time to the adverse action." *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009). Here, according to the amended complaint, the first grievance Plaintiff filed was a

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[10] I express no opinion regarding whether Plaintiff's retaliation claim is sufficiently well-pleaded to survive a motion to dismiss.

December 7, 2006, letter to the Inspector General regarding Defendant Bishop's alleged use of excessive force. (Dkt. No. 38 at 3, 7-8.) Plaintiff alleges that Defendant LeClair issued a memorandum one week later authorizing a second seven-day period of restricted diet. (Dkt. No. 38 at 15.) Therefore, Plaintiff's retaliation claim is sufficiently well-pleaded to survive initial review.

D. Due Process Claim

In the amended complaint, Plaintiff continues to assert a due process claim regarding the imposition of the restricted diet. (Dkt. No. 38 at 25-29.) Plaintiff's due process claim regarding the restricted diet was dismissed pursuant to the Court's order of July 12, 2010. (Dkt. No. 28.) In dismissing the claim, the Court relied on the rule in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), which holds that a prisoner asserting a procedural due process cause of action must allege that he was subjected to some "atypical and significant hardship." (Dkt. No. 22 at 7; Dkt. No. 28 at 3.) Under Second Circuit precedent, the imposition of a restricted diet does not impose an atypical and significant hardship on inmates. *McEachin v. McGuinnis*, 357 f.3d 197, 200-01 (2d Cir. 2004). The dismissal was with prejudice, and Plaintiff was not granted leave to amend. I note that the vast majority of the cases that the amended complaint cites in support of the unauthorized renewal of the procedural due process claim predate *Sandin*.

WHEREFORE, it is hereby

RECOMMENDED that (1) Plaintiff's Eighth Amendment claim against Defendant LeClair be dismissed without leave to amend; (2) Plaintiff's claim regarding the loss of video recording be dismissed without leave to amend; and (3) Plaintiff's equal protection claim against Defendant LeClair be dismissed without leave to amend; and it is further

RECOMMENDED that Defendant LeClair be directed to respond to Plaintiff's retaliation claim within thirty days of any order adopting this Report-Recommendation; and it is further;

RECOMMENDED that Defendants Bishop and Marocco be directed to respond to the amended complaint within thirty days of any order adopting this Report-Recommendation; and it is further

ORDERED that all other deadlines in this case be adjourned without date; and it is further

ORDERED that Defendants' requests for extensions of their time to respond to the amended complaint and for scheduling orders (Dkt. Nos. 39, 41, and 43) are **DENIED AS MOOT**.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW**. *Roldan v. Racette*, 984 F.2d 85 (2d Cir. 1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

Dated: June 1, 2011
Syracuse, New York

George H. Lowe
United States Magistrate Judge